87-1677

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STEVE ANGELICA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Question Of Bail Pending Appeal

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Petitioner, Pro Se
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QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of due process for the Court of Appeals to refuse to give an opinion on the merits of a motion for bail pending appeal?

2. Pursuant to 18 U.S.C. §3143(b)(2), how is the level of merit to be defined which petitioner must demonstrate to show a "substantial question"?

3. Is a res judicata question a "substantial question", where the district court was given direct jurisdiction over allegations of violations of parallel criminal statutes, apart from and prior to a criminal indictment, and where there was a final judgement based on a settlement with a privy?

4. Is a compulsary joinder question a "substantial question", where allegations of criminal conduct based on the "same transactions" were made in actions by two independent Federal agencies?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, STEVE ANGELICA, respectfully prays that a writ of certiorari issue to review the denial to him of bail pending appeal by the United States Court of Appeals for the Ninth Circuit on January 7, 1988.

The Court of Appeals failed to give any reasons for its action, rendering only a summary denial. [App. A.] Among other questions, this petition seeks application of the "same transaction" test proposed by Mister Justice Brennan in Brown v. Ohio, 432 US 161, 170, 53 L Ed 2d 187, 97 S Ct 2221 (1977).

OPINION BELOW

This petition concerns only petitioner's third motion for bail pending

appeal to the Court of Appeals, made in conjunction with petitioners appeal of the judgment of convictions in U.S. v. Angelica, Docket No. 86-5291. The Court of Appeals construed petitioner's motion as a motion for "further reconsideration" despite the fact that previous motions for bail pending appeal were on completely different and unrelated grounds, and denied the motion without an opinion on January 7, 1988. [App. A.] A brief history is in order.

On February 2, 1987, a hearing was held in U.S. District Court for the Central District of California on petitioner's original motion for bail pending appeal. The motion was denied solely on the ruling that petitioner lacked a "substantial question". Petitioner was found to be neither a flight risk, nor a danger to the community, nor was the motion found to be for

purposes of delay. 18 U.S.C. §3143(b)(2). The district court refused to give a written opinion, ruling that the transcript of the hearing would serve as such. Said transcript could not be obtained until nine months later, due to the irresponsibility of the court reporter. [App. B.][1/]

Forced to proceed without the hearing transcript or even the trial record, petitioner appealed the district court's denial. The Court of Appeals denied the motion on March 3, 1987, without an opinion on the merits. [App. C.] A subsequent motion for rehearing with a suggestion for consideration en banc was denied on April 1, 1987, also without an opinion. [App. D.]

Upon the availability of the trial record, but still without the

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1/ The court reporter has left town still still owing petitioner a refund.

bail hearing transcript from the district court, petitioner renewed his motion for bail pending appeal to the Court of Appeals, citing from the record in support of his showing. This second motion for bail pending appeal was construed as another motion for reconsideration, and on November 1, 1987, was again denied without an opinion. [App. E.]

Petitioner's third motion for bail pending appeal to the Court of Appeals, the subject of this petition, was based on new constitutional issues raised for the first time on appeal. Because "substantial rights" are involved, Ninth Circuit precedents suggest that review ought to be favored. U.S. v. Lopez, 575 F 2d 681, 685 (9th Cir. 1975). Therefore, the merits of petitioner's motion on these grounds need be addressed. However, since the Court of Appeals has inexplicably chosen to construe this new motion on

entirely new grounds as a motion for "further reconsideration", there has never been a finding of fact on the merit of these new grounds. In again refusing to give an opinion, the Court of Appeals refuses to explain their action, and clearly will not do so barring an order from this Court.

JURISDICTION

On January 7, 1988, the Court of Appeals entered its denial of bail pending appeal to petitioner. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> Nor shall any person be subject for the same offense twice to be put in jeopardy of life or limb ...nor be deprived of life, liberty or property, without due process of law...

STATEMENT OF CASE

On December 4, 1987, petitioner made a direct motion to the Court of Appeals for the Ninth Circuit applying for bail pending appeal. Petitioner had previously applied for bail on entirely different and unrelated grounds. The Court of Appeals refused to give any opinion on the merits. The district court had previously found that petitioner was neither a flight risk nor a danger to the community, so the question of bail pending appeal hinges solely on the definition of a "substantial question". 18 U.S.C. §3143(b)(2).

REASONS FOR GRANTING THE WRIT

1. The Refusal To Give An Opinion On The Merits Of A Motion For Bail Pending Appeal Is A Denial Of Due Process

Petitioner respectfully calls on this Court to adopt a rule as to the circumstances under which a Court of Appeals must give an opinion on the merits of a motion for bail pending appeal. It is well settled that the district court must give a written statement of reasons for denial of bail pending appeal. FRAP 9(b); U.S. v. Wheeler, 795 F 2d 839, 841 (9th Cir. 1986). Otherwise a reviewing court cannot evaluate the application or the court's decision on their merits. How strange therefore that there is no parallel requirement at the appellate level, which would allow review by this Court.

In this case the motion for bail

pending appeal was made directly to the Court of Appeals, pursuant to FRAP 9(b), on new grounds not raised previously. Thus, there has never been a written statement of reasons for denial as to the grounds addressed herein. This is a denial of due process, especially since the burden is on petitioner. FRAP 9(c).

2. There Is A Conflict Among The Circuits As To How The Level Of Merit Represented By A "Substantial Question" Should Be Defined, Pursuant To 18 U.S.C. §3143(b)(2)

The Third Circuit took the lead in interpreting the Bail Reform Act of 1984. U.S. v. Miller, 753 F 2d 19, 23 (3rd Cir. 1985), defines a "substantial question" as:

> "one which is either novel... has not been decided by controlling precedent, or... is fairly doubtful."

Subsequently, in U.S. v. Giancola, 754 F 2d 898, 900-901 (11th Cir. 1985), the 11th Circuit concurred with this, but added almost as an afterthought their opinion that a "substantial question" should further be:

> "a 'close' question or one that very well could be decided the other way."

This has since developed into a standard of its own, adopted by the 10th Circuit in particular.[2/] U.S. v. Affleck, 765 F 2d 944, 952 (10th Cir. 1985). Even the "lead" case in the Ninth Circuit reflects this conflict in its dissent. U.S. v. Handy, 761 F 2d 1279, 1285 (9th Cir. 1985).

It could be argued that since majority in Handy favored the less restrictive Miller standard petitioner

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2/ Although this Court denied certiorari in Giancola, at that time it was not clear that it would become a divergent standard.

should presumably already have been the beneficiary. However, without an opinion on the merits, this is impossible to determine. See Section 1, supra. The questions raised herein are both novel and without controlling precedent, suggesting that the Court of Appeals did not apply their own Handy standard. In any case, the conflict among the circuits must ultimately be resolved by this Court, and petitioner respectfully offers his case for that purpose.

3. A Previous Action By A Privy, Which Incorporated All The Essential Allegations Of A Subsequent Criminal Case Becomes Res Judicata Upon Settlement

In this case, the Federal Trade Commission brought a previous complaint on multiple causes of action. Case No. 83-5268 CD/CAL. One of those was an action for restitution. Petitioner argues that

for res judicata purposes that cause of action was the same as a later criminal indictment. As a constitutional issue of double jeopardy, petitioner seeks a ruling from this Court in the context of the showing of a "substantial question". 18 U.S.C. §3143(b)(2).

What makes this case unique is that the FTC apparently never even had a jurisdictional claim of their own for restitution. FTC v. Evans Home Products Co., 775 F 2d 1084, 1087, n. 1 (9th Cir. 1985). The FTC could only bring "violations" to the "attention" of the court.[3/]

Res judicata applies in criminal cases. Sealfon v. U.S., 332 US 575, 578,

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3/ This Court may take the occasion to question the propriety of the FTC action, but it would be res judicata even if the FTC action were wrong. Federated Department Stores, Inc. v. Moitie, 452 US 394, 398, 69 L Ed 2d 103, 101 S Ct 2424 (1981).

92 L Ed 180, 68 S Ct 237 (1948). Res judicata applies where there is (1) identiy of causes of action, (2) a final judgement on the merits, and (3) identity of parties or their privies. Commissioner of Internal Revenue v. Sunnen, 333 US 591, 597, 92 L Ed 898, 68 S Ct 715 (1948).

Here the criminal indictment was based on the FTC action. As a typical example, Count 3 of the indictment concerned a purchase order #2186. This same purchase order was attached as an exhibit to the initial filings in the FTC action, in support of a temporary restraining order. The essential allegations were the same. Petitioner was indicted under 18 U.S.C. §§1341, 1343, which require (1) use of the mails or wire, (2) a scheme to defraud, and (3) intent or participation. U.S. v. Bohonus, 628 F 2d 1167, 1171 (9th Cir. 1980), cert denied, 447 US 928, 65 L Ed 2d 1122, 100 S Ct 3026

(1980). In their First Amended Complaint, the FTC alleged all three: (1) use of the telephone and the mailing of merchandise, (2) a "scheme to deprive customers of... property...by a variety of false representations", and (3) that petitioner "formulates, directs, controls, and participates in the acts and practices [alleged]". Since the essential allegations were the same, so too must be the causes of action. Nevada v. U.S., 463 US 110, 130, 77 L Ed 2d 509, 103 S Ct 2906, n. 12 (1983).

The FTC action was settled on the merits. A settlement agreement was entered by the district court in the FTC action "which shall constitute a final judgement in this action as to defendant Steve Angelica" on August 22, 1985. A stipulated settlement entered by the court is a final judgement for res judicata purposes. Lawlor v. National Screen

Service Corporation, 349 US 322, 327, 99 L Ed 1122, 75 S Ct 865 (1955). The criminal case was not indicted until February 6, 1986.[4/]

Finally, the FTC and the assistant U.S. Attorney shared information. The FBI agent who appeared before the Grand Jury testified as to "complaints we received or received a referral from...the Federal Trade Commission". Further, these two agencies had a shared enforcement interest, which alone establishes the necessary privity. U.S. v. ITT Rayonier, Inc., 627 F 2d 996, 1003 (9th Cir. 1980).

This question was not raised at trial, however, because "substantial rights" are involved, indicating "plain

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4/ By comparison, petitioner respectfully asks this Court to take judicial notice of the recent and much publicized Ivan Boesky case, where Boesky agreed to plead guilty to a criminal charge as a condition of his "civil" settlement. There was no such condition here.

error", review should be favored. U.S. v. Lopez, 575 F 2d 681, 685 (9th Cir. 1975); FRCrP 52(b). The Court of Appeals need only take judicial notice of the official court records of the FTC action. Yet, the Court of Appeals has refused to even give an opinion on the merits of petitioner's motion for bail pending appeal on these grounds. See Section 1, supra.

4. Actions Involving The "Same Transactions" Are Governed By The Doctrine Of Compulsary Joinder

In a series of concurring opinions, Mister Justice Brennan proposed the "same transaction" test to determine if two separately filed actions must be tried together. Brown v. Ohio, 432 US 161, 170, 53 L Ed 2d 187, 97 S Ct 2221 (1977). In this case, the assistant U.S. attorney did not seek a criminal indictment until after the FTC case was settled.

Up until the final disposition of

the FTC case there was apparently nothing to prevent traditional criminal charges also. However, by holding of FTC v. Evans Home Products Co., supra, the FTC action gave the district court direct jurisdiction over a cause of action for the "violations" alleged. See Section 3, supra. Therefore, since both actions grew out of the same alleged "criminal acts" compulsary joinder must apply. Brown v. Ohio, supra.

This question has the same reviewability status and importance to the bail question as the res judicata question. See Section 3, supra.

CONCLUSION

Based on the foregoing, it is respectfully submitted that there are substantial grounds for this Court exercising its supervisory power. Moreover, there is evidence that many other meritorious candidates for bail pending

appeal are being arbitrarily denied, and it is difficult to appeal this abuse of discretion. In the 10th Circuit, Justice McKay has written a series of increasingly exasperated dissents, typified by U.S. v. Patterson, 780 F 2d 883, 884-888 (10th Cir. 1986). Patterson was ruled not even to have had a "substantial question", yet he won his appeal barely two months later. U.S. v. Austin, 786 F 2d 986 (10th Cir. 1986). The intent of Congress was to limit bail on appeal, not to quash it.

As in the earlier motions in this case, motions for bail pending appeal are routinely made without even the trial record. Yet, in practice the burden of proof is being equated with that of winning the appeal itself, making the actual burden higher. What should be called for is some intermediate showing of merit, still more than "not frivolous".

For all the foregoing, STEVE

ANGELICA, petitioner, respectfully requests that a writ of certiorari issue to review the denial of bail pending appeal by the United States Court of Appeals for the Ninth Circuit.

Dated: March 28, 1988

Respectfully submitted,

Steve Angelica, Pro Se
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5291

DC# CR 86-111-PAR
Central California

UNITED STATES OF AMERICA,
Appellee,

v.

STEVE ANGELICA,
Appellant.

Before: TANG and O'SCANNLAIN, Circuit Judges

ORDER

Appellant's motion for bail pending appeal is construed as a further motion for reconsideration and is again denied.

Filed: Jan. 7, 1988

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 86-111-PAR
CA 86-5291

UNITED STATES OF AMERICA,
Plaintiff,

v.

STEVE ANGELICA,
Defendant.

Honorable Pamela Ann Rymer, Judge
Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA

February 2, 1987

[Excepted Opinion of the Court]

The Court: I understand you are urging that there are four grounds for appeal. The first being the admission into evidence of the tape recorded conversation between Stephanson and Stephan Small and yourself; exclusion of

testimony by an expert, an accounting witness; inadequacy of jury instructions, in that the instructions did not adequately define the concept of materiality, and jury confusion with respect to what was required for proof of intent due to the inadequacy of the instruction and conflicting testimony and argument.

Basically it seems to me that the question of admissibility of the tape and the question of exclusion of expert testimony are matters that are within the discretion of the court. I considered all of the arguments that were made by your counsel and counsel for co-defendants at the time and, after weighing whether the potential prejudice from the tapes exceeded the relevance, concluded that it did not and went through the admissibility of a number of different tapes, and, upon review of the record, I admitted some and

did not admit others. After listening to them and after the trial and on the whole record, even if there were a substantial question raised with respect to the admissibility, which I believe there is not, then it seems to me that the evidence as a whole was so overwhelming as to guilt that is would be harmless error and, therefore, not likely to result in reversal or a new trial on appeal. The question of the admissibility of the tapes did not raise any kind of novel question or any kind of particularly difficult one, and to the extent that the tapes were delivered somewhat later than might have been preferable, the trial covered a span of three and perhaps four weeks and there was ample time for dealing with the tapes, and I do not recall any defense counsel actually suffered in cross-examination or in any other way on account of it.

Mr. Stephanson was vigorously

cross-examined, not only by your counsel, who was enormously capable, but also by very good counsel representing the co-defendants, all of whom had a mutual interest, and it was not apparent to me that their cross-examination lacked vigor or effectiveness in any way on account of the timing of production of the tapes.

So far as admissibility of expert opinion is concerned, I heard the expert in camera, or outside the presence of the jury, took a proffer of what his testimony would have been and concluded at the time that his testimony was not competent or qualified. To a very great extent, the proffered testimony would have been based on inadmissible documents not of the sort upon which an expert would reasonably rely in coming to a qualified expert opinion. I don't believe that on the trial record, the receipt of that opinion raises a substantial question, but

even if it did, exclusion of expert testimony is upheld on appeal unless manifestly erroneous, and I do not believe that exclusion of this expert on the record of this trial would be found to be manifestly erroneous, particularly in light of the entire record of the trial proceedings.

I do not have a 100 percent recollection about what objections were posed to which instructions, but I do not recall that any were made to the materiality instructions, either what they said or what they did not say. My recollection is that the instructions that were given are standard form instructions and I did not reject any that were any different. Now, I could be wrong on that. Because of not having a transcript, I can't say for certain, and perhaps Mr. Fahey or your recollection would differ, but I don't recall. In any event, whether

there was an objection or not or any different version requested or not, the instruction seemed adequate to me to cover all of the points and permit argument to be made on each defendant including your theory of the case.

Finally, so far as jury confusion is concerned, as I understand your argument, you concede that the jury's verdict as to you was reached prior to the request for and any use of the dictionary, and it was my finding that this was the case. As I understand it, you instead argue that the fact that there was a request for a dictionary and use of it in order to determine meaning of artifice suggests in some way that the jury was confused overall. I don't believe that's a fair or proper conclusion. Indeed, it seems to me that the jury was quite discriminating in its approach to its decisions by defendant and by issue and

that the questions sent through notes reflect that the jury had particular concern about the culpability of Mister -- Leslie Small's involvement in a way which showed me that they were being very careful to apply the appropriate standards of knowledge and willfulness.

I think the Circuit, having already dealt with an issue that is substantially identical in the Steele case, would indicate further to me that even if some kind of substantial question were raised, given the way it was dealt with and handled and the findings which were made, that it could not result in a new trial or reversal on appeal.

I certainly do not believe that you personally pose a risk of flight. You have made all of your appearances religiously, and I trust that you will continue to do so, not do I personally see you as posing a continuing danger to

society, reconnizing that according to everything we know, you did stop the kind of activity which led to your conviction in this case sometime ago.

I don't believe that the request for bail pending review under all of the circumstances in and of itself was undertaken simply for the purpose of delay. I am prepared to accept that it's more difficult proceeding pro se to get the papers together, and, of course, I also ruled adversely to you on the right to have costs absorbed. So I don't believe that this was done -- or the timing of it alone indicates that it was done for the purpose of delay, but I do think that under the new act, which must be applied, that you have not met your burden of showing merit of the appeal as the statute imposes upon you and requires you to do.

[Date of Transcription: October 24, 1987]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5291

DC# CR 86-111-PAR
Central California

UNITED STATES OF AMERICA,
Appellee,

v.

STEVE ANGELICA,
Appellant.

Before: TANG and O'SCANNLAIN, Circuit Judges

ORDER

Granting appellee's motion for an extention of time to file its opposition to appellant's motion for bail pending appeal. The opposition, already received, is ordered filed.

Appellant's motion for bail pending appeal is denied. Appellant has not demonstrated that his appeal presents a

substantial question of law or fact likely to result in reversal or an order for a new trial. Appellant's motion for leave to appeal in forma pauperis is denied.

Filed: March 3, 1987

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5291

DC# CR 86-111-PAR
Central California

UNITED STATES OF AMERICA,
Appellee,

v.

STEVE ANGELICA,
Appellant.

Before: TANG and O'SCANNLAIN, Circuit Judges

ORDER

Appellant's motion for reconsideration is denied. The suggestion for consideration en banc is rejected.

Filed: Apr. 1, 1987

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5291

DC# CR 86-111-PAR
Central California

UNITED STATES OF AMERICA,
Appellee,

v.

STEVE ANGELICA,
Appellant.

Before: TANG and O'SCANNLAIN, Circuit Judges

ORDER

Appellant's motion for bail pending appeal is construed as a motion for reconsideration and is denied.

Filed: Nov. 4, 1987

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987 No. _____

STEVE ANGELICA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO)

ARLENE STONE, after being duly sworn, disposes and says that pursuant to Rule 28.4 (a) of this Court, she served three copies of the within PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT on counsel for the Respondent by enclosing copies thereof in an envelope, first class postage prepaid, addressed to:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States

mails at San Francisco, California, on April 5, 1988.

Arlene Stone, Affiant

Subscribed and Sworn to Before Me this 5 day of April, 1988.

Notary Public in and For Said County and State

BETH H. TETERS
NOTARY PUBLIC - CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
My Commission Expires May 14, 1988